SUPREME COURT
74-826
JAN 2 1975
MICHAEL RODAK, JR.

In the

Supreme Court of the United States

October Term, 1974

No.— A-371

Charles Bergstralh,
Petitioner,

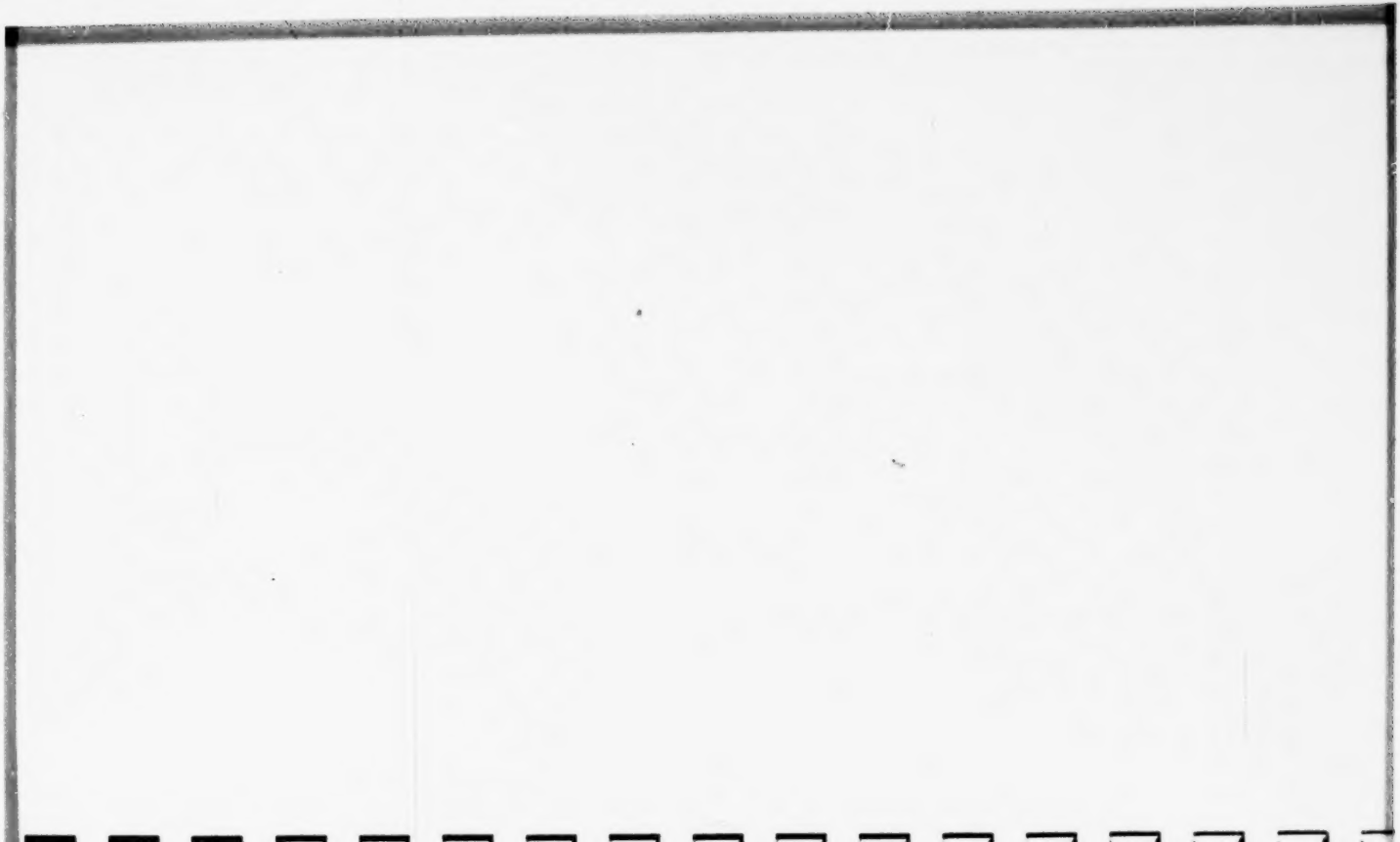
—Against—

Gayle Lowe and City of Bend, Oregon
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Charles Bergstralh
Petitioner
Box 961
Bend, Oregon 97701

December 27, 1974



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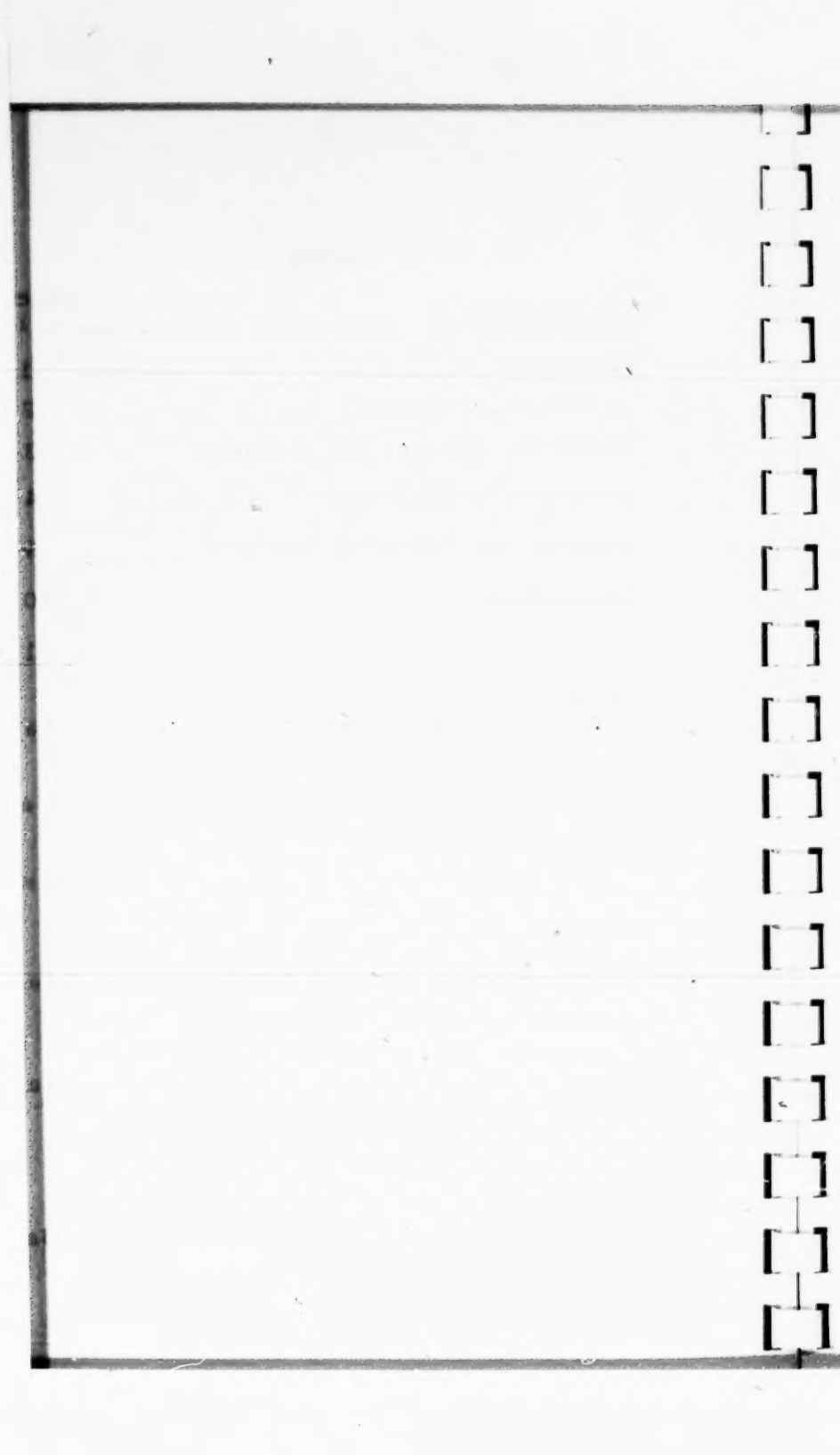

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The petitioner, Charles Bergstralh, respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 6, 1974.

Opinions Below

The opinion of the Court of Appeals, appears in the Appendix hereto. Verdict of the District Court contained in separate volume.

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 6, 1974. The time to file this petition was extended from November 4,

1974, to January 3, 1975 by order of Mr. Justice Douglas, dated November 6, 1974. (Appendix F) This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

Questions Presented

1. Whether this Court should exercise its supervisory powers over lower federal courts in this case in view that the petitioner's conviction for resisting arrest was obtained by a conspiracy to convict Bergstralh on the part of the police, the city attorney, and municipal court; and, evidence of perjury of the prosecution witness, Jasa in municipal court testimony.

2. Whether there is a real conflict between the decision below and the decision as applied in the Hryciuk v. Robinson presumption at district court which warrants review by this Court?

3. Whether this Court should exercise its supervisory powers over the lower federal courts in this case due to the failure below to give recognition to the confusion and conflicts in the finding of fact, judgment and decision on the double charges against Bergstralh; a 'record' of acquittal at the municipal court level on the resisting arrest charge; the inability to have the appeal heard at the circuit court level because of double jeopardy; the two charges not tried separately, in separate trials thus denying Bergstralh due process and civil rights; and whether all of this does not constitute a fundamental unfairness warranting review by this Court.

4. Whether this Court should exercise its supervisory powers over lower federal courts in this case due to the failure of the district court to allow the plaintiff to establish proof the conviction in the municipal court was obtained by fraud.

Statutory Provisions Involved

United States Code, Title 28:

Section 1254. Courts of Appeals; Certiorari; Appeal; Certified Questions.

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;..."

The Constitution of the United States

The Bill of Rights:

Amendment IV and Amendment XIV

Statement of the Case

Petitioner was arrested by city patrolman about midnight May 14, 1969 on his own property inside store for violation of a city ordinance #737 Section 4 Disorderly conduct, complaint #18078. He was also charged with violation of Ordinance #737 Section 10 Resisting complaint #18079.

Petitioner was having a parking lot sale crowded with $65,000. of major appliances and color Tv. At 11:15 p.m. plaintiff's 76 year old father-in-law (Tr 200) stood watch while petitioner got a late lunch at Denny's restaurant a block away. When petitioner returned from lunch, he stayed alone on parking lot. (Tr 175, 269) He saw two men, Bob Jasa and Mike Grant (Tr 57) and their car on his lot; (Tr 175) as Grant was urinating on a new refrigerator. (Tr 175) He ordered them off the property for drinking beer, but Jasa and Grant refused to leave, using obscene language. Neighbor up the street was murdered for only $200 by trespassers, so petitioner was anxious to get them off the property because of all the inventory on the lot.

Respondent was cruising in patrol car as petitioner begged for his assistance to arrest the trespassers for being under the influence and urinating. Trespassers denied drinking. Policeman (22yr? old) look-at Grants I.D. noting he was a minor-but ignored the beer bottles insisting it was all right for them to be drinking as he'd not seen them drinking. They told him the car was broke down so he proceeded to aid them. Respondent noted the smell of beer on their breath. They lived a block away.

Petitioner asked the respondent to look at the bottles, and when he refused, he told them to take their beer bottles with them as he tossed them on his own parking lot. He went into his store angry because of lack of cooperation on the part of policeman.

Policeman forced his way into the store and told petitioner he was under arrest, and was going to jail. Petitioner refused, saying he could not leave all of the merchandise sitting outside unattended as someone could steal it. He said he would go if the respondent would get someone to protect the property. The respondent proceeded with force to take petitioner and he called for the now (three) trespassers and they all jumped on petitioner to handcuff him and knock him down and batter on him. Policeman took Bergstralh to jail, leaving the trespassers to do their thing.

Later, the desk sergeant got the wife to go to the police station and then he went to investigate the situation. He inspected where the bottles were laying on the parking lot of the petitioner in front of the building. He told wife, if he had handled the incident, it would not have happened. Wife told him she would take pictures of the bottles broken.

Municipal judge refused to release the petitioner on his own recognizance so bail had to be posted. Municipal court refused to hear the two charges separately, but put them both into one trial.

Deliberate instructions were made to the jury that they would have to find the de-

fendent (petitioner) guilty of resisting arrest. The then counsel objected but again the court instructed jury that he would accept nothing but a guilty verdict on the resisting arrest charge.

At the municipal trial, Jasa testified they had not been drinking beer. The car had broken down, he claimed. Grant went to Alaska so he did not testify in court.

The jury returned the verdict as they were instructed by the judge- "guilty"of resisting arrest. They found "not guilty on the disorderly conduct.

The judge admonished Bergstralh and he suspended all but $25 of the fine. Then he signed the 'resisting' charge as 'not guilty'. This was the #737 Section 10, of the Resisting complaint # 18079. He signed the #737 Section 4 Disorderly conduct complaint #18078 as guilty. This on July 14, 1969 was exactly 61 days after the arrest.

The then counsel was told to file an appeal immediately. There was thirty days in which to file. On the 29th and 30th days, the attorney assured Bergstralh he had filed the appeal and that the case on appeal would be on the winter docket. Another attorney informed petitioner that the appeal was not on the docket. Wife of petitioner confronted the attorney and he explained the other attorney was responsible. Wife reported all of the attorneys in question to the Oregon State Bar and in the meantime a late filing was accepted by the city. State Bar ethics committee investigated found no unethical conduct.

September 19, notice of appeal was filed. October 15, 1969 order allowing appeal was signed.

Petitioner retained another attorney to handle appeal and he noted the discrepancy in the records.

Bergstralh could not appeal the resisting arrest as the record already showed a not guilty record. He could not have another trial for disorderly conduct as he would have double jeopardy.

The attorneys informed Bergstralh that the judge would probably find him guilty this time and he would have a $1000 fine and a ninety day jail sentence, and would most likely lose his appeal.

Circuit court decided the record of resisting showed a "not guilty" so charge, was dismissed and the fine refunded to Bergstralh. This dismissal was recorded in March 1970.

Proof of fraud in the testimony and coercion used in the municipal court trial is the statement made to the newspaper by the city attorney. He stated that the trespassers had merely rolled their car off to the parking lot. These statements given by the city attorney is further evidence of the conspiracy on the part of the police, the city attorney and the municipal court to have a conviction against Bergstralh, so that the city would not be liable for the imprudent judgment on the part of the arresting officer. The officer made a human mistake, he took sides against the old guy (who was "just a watchman" as he described Bergstralh,) and was

for the trespassers. In his unreasonable reasoning, he could find nothing wrong in the trespassers actions and it was okey for the minor to be in possession. Yet he was supposed to be able to determine a reasonable amount of force to effect an arrest and a supposed resist.

In the district court deposition, Jasa changed his testimony and admitted that he had been drinking. Grant testified that he had been a minor drinking and that he had urinated on the new refrigerator.

A prevailing view in this free country is that a person is innocent until he is proven guilty - not that he must prove it but that the guilt must be proven.

The appeal court says the district court did not err in instructing the jury that reasonable force is determined by what force Lowe believed was necessary. How could he reason reasonable force, when he could not reason the trespassers were trespassing.

The conspiracy of the city police, attorney, and court to cover up an employee' mistake in prudent judgment should not be at the expense of a citizen who has the right to protect his property from would-be invaders, or trespassers.

REASONS FOR GRANTING THE WRIT

1. This Court Should Exercise Its Supervisory Powers Over the Lower Federal Court in This Case.

This Court should in this case exercise its supervisory powers over the lower federal courts. The District Court continued to view the petitioner as "guilty" of the resisting charge even though the city or municipal court used coercion to get a conviction. There is no certainty that the municipal court and the city attorney did not conspire to sign the wrong paper deliberately, to insure Bergstralh from getting a fair trial in a higher appeal. By putting the two charges together, the petitioner would be unable to appeal the case. This tends to show either the absurdity of the charges which are almost the same in this case or the ineptness of the prosecution. Whichever the reason, either is bad and should not be condoned. This does not mention the perjury on the part of the prosecution witness, Jasa. The very fact that the municipal court did not have a transcript was a further effort on the part of the conspirators to deny the petitioner due process.

The perjured testimony although not part of the transcript (since there was none) cannot be disproved. The statement on the part of the city attorney to the newspaper tends to support the inaccuracy of Jasa's testimony.

There was a deliberate change of numbers on the complaint. The tampering is obvious.

CONCLUSION

The issues presented here are of great importance, (They involve the civil rights of a citizen who was wronged by poor judgment of some others) that a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

Charles Bergstralh

Charles Bergstralh
Petitioner

Box 961
Bend, Oregon 97701

December 27, 1974

Certificate of Service

I hereby certify that on this 31st day of December, 1974, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid to:

Thomas S. Moore Esq.
Morrison & Bailey
1700 Standard Plaza
Portland, Oregon 97204

Ronald L. Marceau Esq.
Panner, Johnson, Marceau
& Karnopp
1026 Bond Street
Bend, Oregon 97701

the attorneys for the respondent. I further certify that all parties required to be served have been served.

Charles Bergstralh

Charles Bergstralh
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Bend, Oregon 97701
Petitioner